National Association of Wetland Managers

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

August 8, 2022

Administrator Michael S. Regan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Via regulations.gov

Re: Clean Water Act Section 401 Water Quality Certification Improvement Rule (Docket # EPA-HQ-OW-2022-0128)

Dear Administrator Regan:

The National Association of Wetland Managers (NAWM) submits the following comments in response to the U.S. Environmental Protection Agency's (EPA) proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule, for inclusion in Docket ID No. EPA-HQ-2022-0128.

NAWM is a national 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland and aquatic resource protection programs. Since 1983, our organization and our member states and tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing states and tribes as co-regulators tasked with implementation of regulations implementing the Clean Water Act (CWA), NAWM understands the complexity of the CWA and the implementation challenges the Act poses. We have worked for many years together with federal, state, and tribal agencies in the implementation of regulatory and non-regulatory programs designed to protect waters of the United States (WOTUS). Our collaboration has involved programs such as the CWA section 401 water quality certification of federal licenses and permits, section 404 permit program for dredged or fill material, state and tribal water quality standards for wetlands, and the jurisdictional status of wetlands and other waters as WOTUS.

CWA section 401 provides that a federal agency cannot issue a license or permit that may result in a discharge to waters of the United States, unless the state or authorized tribe where the discharge would originate certifies the discharge would be consistent with water quality requirements or waives its authority to do so[1]. No 401 certification or waiver means no federal permit or license. The authority in section 401 is a direct grant from Congress to states (and tribes with "treatment in a similar manner as a state" (TAS)

[1] CWA Section §401(a)(1), 33 U.S.C. §1341(a)(1).

status) and does not require EPA program approval. The CWA relies on Section 401 to help ensure that federal licenses and permits are consistent with aquatic resource protection and goals of the Act.[2] Those statutory goals cannot be met if regulations inappropriately limit the section 401 process and scope. Section 401 certification is a critical aquatic resource protection tool for many states and tribes. For example, NAWM data indicates that well over half of states rely on section 401 certification as their wetland protection program.[3]

In its June 2021 Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Notice of Intent), EPA indicated that it "seeks to revise the rule in a manner that promotes efficiency and certainty in the certification process … and that is consistent with the cooperative federalism principles central to CWA Section 401."[4] This is a welcome shift from the approach taken in the 2020 Section 401 Certification Rule (2020 Rule). The 2020 Rule moved sharply away from cooperative federalism in its attempt to limit state and tribal use of section 401 as a water quality protection tool. The primary goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters,"[5] and the Act expressly recognizes the critical and important role states and tribes play in protecting and enhancing waters within their respective borders.[6] The CWA includes express provisions preserving state authority. For example, Congress maintained for each state the authority to adopt or enforce the conditions and restrictions the state considers necessary to protect its waters, provided those standards are not less protective than federal standards.[7] And, Congress in CWA section 401 expressly authorized states to independently review the water quality implications of projects that may result in a discharge requiring a federal license or permit to ensure such projects are consistent with water quality requirements.[8] NAWM hopes that CWA provisions such as these and the cooperative federalism approach reflected throughout the Act will serve as a guide for revising the 2020 Rule.

NAWM believes the 2020 Rule inappropriately limited section 401 certification, and we strongly support EPA's intention to revise those regulations. As discussed below, NAWM believes that the proposed Clean Water Act Section 401 Water Quality Certification Improvement Rule is substantially more consistent with cooperative federalism than its predecessor rules and is more consistent with section 401 and statutory goals.

EPA's Notice of Intent acknowledges the extensive interest states and tribes have in a revised certification rule, and indicates EPA wants to ensure significant opportunities for input from these co-regulators as well as from stakeholders. NAWM welcomes opportunities for input into emerging section 401 certification policies. In addition to consulting with interested parties through the listening sessions discussed in the Notice of Intent, **NAWM encourages EPA to have a series of interactive meetings with co-regulator states and tribes that involve discussions on key issues, including potential**

[2] Congress intended section 401 to help ensure that all discharge activities authorized by federal agencies would comply with "state law" and that "Federal licensing or permitting agencies [could not] override State water quality requirements." *See* S.Rep. 92-313 at 69, *reproduced in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1487 (1973).

[3] Association of State Wetland Managers, Inc., 2015. Status and Trends Report on State Wetland Programs in the United States.

[4] 86 Fed.Reg. 29541, 29542 (June 2, 2021).

[5] CWA §101(a), 33 U.S.C. §125(a).

[6] "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…" CWA §101(b), 33 U.S.C. §125(b).

[7] CWA §510, 33 U.S.C. §1370.

[8] CWA §401(a), 33 U.S.C. §1341(a).

implementation challenges and opportunities. Such meetings should include both discussion at the national level, as well as direct meetings between EPA Regions and the relevant states and tribes. Such dialogues would be interactive and collaborative in nature and therefore should be more helpful to EPA than receiving input in the form of short statements at a listening session or in letters from interested parties. Also, discussions among regional, state, and tribal representatives will help ensure implementation challenges and opportunities are well-understood by national policymakers. NAWM would be very willing to participate in such discussions, including helping to organize, host, or facilitate.

NAWM's comment letter addresses many specific policies in the proposed section 401 certification rule, addressing each in the order they are presented in the proposal.

Provisions of the Proposed Section 401 Rule

EPA's proposed Clean Water Act Section 401 Certification Improvement Rule (Proposed Rule) includes numerous provisions affecting both state/tribal certifying authorities as well as EPA as a certifying authority. NAWM's comments focus primarily on provisions affecting state and tribal certifying authorities, including:

1. When section 401 certification is required
2. Pre-filing meeting requests
3. Request for certification
4. Reasonable period of time
5. Scope of certification
6. Certification decisions
7. Federal agency review of certification decisions
8. Modifications of certifications
9. Enforceability of certification conditions
10. Neighboring jurisdictions
11. Treatment in a Similar Manner as a State (TAS) for Section 401

This letter addresses each provision in turn, providing both background and policy recommendations.

1. When Section 401 Certification Is Required

Both the Proposed = Rule and the 2020 Rule provide that a federal license or permit for any potential discharge into a water of the U.S from a point source requires a section 401 certification or waiver.[9] To trigger section 401, the license or permit must be from a federal agency, as opposed to, for example, from a state that has assumed a permit program under the federal CWA.[10] The license or permit must authorize a discharge, even though that discharge need not involve a pollutant and need not be certain to occur.[11] The potential discharge must be into a water of the US, although non-federal waters may be a consideration once section 401 has been triggered.[12] Under the Proposed Rule, the potential discharge must be from a point source to trigger section 401.

1a. Elements Triggering Section 401 Need Not Include "Point Source"

[9] 87 Fed.Reg.35318, 35327 (June 9, 2022).
[10] *Id.*
[11] *Id.*
[12] *Id*.

NAWM agrees that CWA statutory language supports the requirement that the license or permit must be from a federal agency, be potential but not certain to result in a discharge, that the discharge need not include pollutants, and that the discharge should be into a water of the United States. However, NAWM believes the requirement that the discharge be from a point source is not compelled by the CWA and, depending on other provisions of the proposed rule, should be omitted.

The proposed rule argues it is appropriate to require the potential discharge be from a point source in light of the 9th Circuit Court of Appeals decision in *Dombeck.*[13] The *Dombeck* court found that all the CWA sections cross-referenced in section 401(a)(1) were related to the regulation of point sources, including CWA section 303 water quality standards. The Proposal Rule notes that *Dombeck* concluded section 303 did "not itself regulate nonpoint source pollution" and, therefore "did not sweep nonpoint sources into the scope of" section 401.[14] The preamble to the 2020 Rule, which first codified the point source requirement, similarly noted "the only exception [to expressly addressing point sources] is section 303, which addresses water quality standards, but these are primarily used to establish numeric limits in point source discharge permits."[15] NAWM does not agree with the preamble's characterization that water quality standards (WQS) are primarily used to establish limits in point source discharge permits, based in substantial part on how EPA has characterized the role of WQS under CWA programs. For example, the EPA Water Quality Standards Handbook observes that WQS are:

> "the foundation for a wide range of programs under the CWA. They serve multiple purposes including establishing the water quality goals for a specific waterbody, or a portion thereof, and providing the regulatory basis for establishing water quality-based effluent limits (WQBELS) beyond the technology-based levels of treatment required by CWA sections 301(b) and 306. WQS also serve as a target for CWA restoration activities such as total maximum daily loads. WQS establish the environmental baselines used for measuring the success of CWA programs, so adequate protection of aquatic life and wildlife, recreational uses, and sources of drinking water, for example, depends on developing and adopting well-crafted WQS. CWA programs such as those developed under Section 303(d), Section 305(h) reporting, Section 401 water quality certification, Section 404 permitting for the discharge of dredged and fill material, and WQBELS in discharge permits issued under the National Pollutant Discharge Elimination System (NPDES) under Section 402 depend on such WQS."[16]

This Water Quality Standards Handbook discussion highlights that standards are not limited to point source-related issues but also can be used to manage nonpoint source contamination. For example, the CWA section 303(d) program requires states and tribes to list waters that violate water quality standards even if all discharges meet applicable effluent guidelines, and to develop "Total Maximum Daily Load" (TMDL) watershed plans that typically use a combination of point- and nonpoint source-based tools to bring the water into compliance with standards.[17] A TMDL may be required even if all sources of

[13] *Oregon Natural Desert Association v. Dombeck,* 172 F.3d 1092, 1093-4 (9th Cir. 1998).
[14] 87 Fed.Reg. 35318, 35328 (June 9, 2022), citing *Dombeck* at 1093-4.
[15] 85 Fed.Reg. 42210, 42253 (July 13, 2020).
[16] U.S. Environmental Protection Agency, *Water Quality Standards* Handbook, *Section 1.2: Purpose of Water Quality Standards* (EPA-823-B-17-001) (September 2014).
[17] See CWA §303(d), 33 U.S.C. §1313(d).

discharge are from nonpoint sources.[18] In other words, section 303 water quality standards address, among other things, nonpoint sources.

Implications of requiring the potential discharge triggering section 401 to be from a point source had a much greater impact under the 2020 Rule than would be the case under the proposed Certification Improvement Rule. The 2020 Rule required the triggering discharge to be from a point source, while also requiring that the scope of a 401 certification analysis be limited to the programs listed in section 401(a)(1) and "other appropriate requirements of state law," defined as state and tribal requirements for point sources.[19] As a result, under the 2020 Rule water quality impacts from nonpoint sources were beyond section 401 even though nonpoint sources can have substantial effect on water quality.[20] In contrast, the Proposed Rule provides that once section 401 has been triggered by a potential point source discharge, certifying authorities do not need to limit their certification analyses to just point source-related requirements.[21] As discussed below under "Scope of Analysis," it is essential that the final Certification Improvement Rule (Final Rule) retain this broad interpretation of the scope of 401 certification analysis. Nonpoint source effects on water quality can be substantial, thereby requiring that nonpoint sources be addressed by section 401 in order to be consistent with the goals of the CWA and section 401. The scope of analysis included in the Proposed Rule would allow consideration of nonpoint sources even if a point source discharge is required to trigger 401 certification.

Recommendation: NAWM supports the Proposed Rule's requirement that, for 401 certification to apply, there must be a federal license or permit and a potential discharge into waters of the United States with or without associated pollutants. NAWM has some concerns about the requirement that the discharge be from a point source. NAWM urges EPA to maintain nonpoint sources within the scope of 401 certification analysis.

2. Pre-Filing Meeting Requests

The Proposed Rule retains the 2020 Rule's requirement for a pre-filing meeting request, while allowing additional flexibility for certification authorities. Under the 2020 Rule, a project proponent had to request a meeting with the certifying authority at least thirty days prior to requesting a water quality certification. The certifying authority had discretion to not grant the meeting,[22] but did not have authority to shorten the thirty-day period or waive the requirement.[23] The Proposed Rule retains the pre-filing meeting request requirement, while allowing the certifying authority to either shorten the thirty-day period or waive the pre-filing meeting requirement altogether for all projects or specified types of projects.[24] The pre-filing meeting is intended to ensure that certifying authorities receive early notification and have an opportunity to discuss the project and potential information needs before the statutory timeframe for review begins.[25]

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[18] *Pronsolino v. Nastri,* 291 F.3d 1123 (9th Cir. 2002).
[19] 40 C.F.R. 121.1(n), 85 Fed.Reg. §42210, 42253 (July 13, 2020).
[20] For a more detailed discussion on the potential impacts of excluding nonpoint sources as a section 401 consideration, see the pre-proposal comment letter submitted by NAWM (under our previous name Association of State Wetland Managers) on July 30, 2021, found at: https://www.nawm.org/pdf_lib/aswm_comment_letter_401_072921.pdf
[21] 87 Fed.Reg. 35318, 35347 (June 9, 2022).
[22] 40 C.F.R §121.4.
[23] 87 Fed.Reg. 35318, 35329 (June 9, 2022).
[24] 87 Fed.Reg. 35318, 35330 (June 9, 2022).
[25] 85 Fed.Reg. 42210, 42241 (July 13, 2020); 87 Fed.Reg. 35318, 35329 (June 9, 2022).

The Proposed Rule adds flexibility for the certifying authority, to accommodate emergency permit situations and to avoid unnecessary delay for smaller less complex projects.[26]

2a. Pre-Filing Meetings Can Have Substantial Benefit but Flexibility is Essential

The statutory maximum period for a 401 certification determination is one year, a short period for complex projects such as large dredge-fill projects or FERC-licensed hydroelectric dams. NAWM believes there could be substantial benefit from the project proponent, certifying authority, and federal authorizing agency talking about the project in advance of starting the statutory certification clock. Parties could, for example, discuss details of the proposed project, information needs of the certification analysis, and how best to coordinate federal processes effectively with state or tribal process requirements. The result could be a better-informed water quality certification and smoother coordination between the certifying state or tribe and the federal agency. Pre-filing meetings may also reduce the need for a certifying authority to make additional information requests once the certification "reasonable period" has begun.

That said, NAWM has heard some concerns about delays caused by the 2020 Rule's pre-filing meeting requirement. For example, a few states have noted that response to an emergency requiring a federal license or permit would be delayed at least thirty days by this requirement. Others have stressed that the meeting request could arrive before a federal agency has determined a permit or license is even necessary. Some states have indicated certifying authorities should be able to waive the pre-filing meeting request requirement, particularly for small likely low-impact projects, since processing of a meeting takes time and for some projects will add little or no value.

In discussions with NAWM's state and tribal members[27], states and tribes have shared that pre-filing meetings have been helpful by leading to more data available for decision making and fewer "surprises" in the formal application. States report that the use of pre-filing meetings has led to a reduced need for back-and-forth communications and requests. They confirm that existing state/tribal systems are often in place and can mesh as needed with discretionary requirements, but not necessarily mandatory requirements. However, states and tribes emphasize that the use of these meetings must remain discretionary and that the Final Rule provides important flexibility for states and tribes that need to respond to emergency applications, where time is of the essence and a mandatory pre-filing meeting could lead to delays and unintended damages. Additionally, emergency responses could be delayed by up to 30 days if pre-filing meetings were required.

EPA requested comment on whether it should define "applicable submission procedures" for pre-filing meeting requests in regulatory text for all certifying authorities, and if so what those procedures should include. Similarly, EPA requested comment on whether the final rule should exclude any particular project types from the pre-filing meeting requirement, require that certifying authorities respond to a pre-filing meeting request in writing within five days of receipt, or otherwise establish processes for the pre-filing meeting process. None of these procedures should be dictated in the Final Rule because state and tribal certifying authorities are more familiar than EPA with aquatic resources in their jurisdiction, information necessary for an informed certification decision about those resources, and available administrative resources, and therefore are better positioned to decide if the specific project subject to 401 certification raises issues meriting advance discussion. Many states and tribes have established processes under the 2020 Rule for pre-filing meeting requests, as well as other early coordination opportunities. For

[26] 87 Fed.Reg. 35318, 35329-30 (June 9, 2022).
[27] NAWM Discussion with States via Teams on 7-13-2022

example, Michigan Department of Environment, Great Lakes and Energy is provided the opportunity for a voluntary pre-application meeting in state law. They argue that a mandatory federal pre-filing request complicates the coordination between federal and state permitting processes by "inserting unnecessary waiting period and documentation requirements into the CWA Section 401 procedure."[28]

Recommendation: NAWM recommends that the Final Rule retain the requirement for a pre-filing meeting request and the provision allowing a certifying authority to not grant the meeting request, but also add authority for certifying authorities to waive the pre-filing meeting request altogether when appropriate. NAWM appreciates the proposal's increased flexibility for certifying authorities to shorten the thirty-day period or waive the meeting requirement where appropriate. The Final Rule should not specify criteria for a state or tribal certifying authority's decision to shorten the thirty-day timeframe or waive the pre-filing meeting request, or whether the certifying authority should grant a meeting or procedures for the meeting. Instead, NAWM recommends the Final Rule leave the details up to the state and tribal certifying authorities.

3. Request for certification

The CWA provides that the period allowed for a certification analysis begins upon receipt of a request for certification,[29] making the definition of "certification request" very important. The 2020 Rule defined a "certification request" as having nine specific elements for individual permits and seven for general permits, and provided that receipt of a request containing these elements starts the "reasonable period of time" available for the certifying authority's certification determination.[30] Unlike the 2020 Rule, the Proposed Rule does not provide an exhaustive list of what constitutes a certification request. Instead, the Proposed Rule provides that a certification request includes a copy of the draft license or permit, and any "existing and readily available data or information related to water quality impacts from the proposed project."[31] State and tribal certifying authorities may define through regulation additional contents of a certification request necessary to make an informed decision.[32]

3a. Requests for Certification Should Include Adequate Data on Aquatic Resource Impacts

The 2020 Rule's list of elements in a certification request were inadequate for an informed certification decision. Several state and tribal certifying authorities expressed concerns to NAWM and others that the elements in the 2020 Rule's definition of "certification request" lacked information necessary to assess the proposed project's consistency with water quality requirements. The preamble to the 2020 Rule acknowledged this lack by noting that "the components of a 'certification request' identified in the final 2020 Rule are intended to be sufficient information to start the reasonable period of time but may not necessarily represent the totality of information a certifying authority may need to act on a certification request," and observed that a certifying authority may request and evaluate additional information within the reasonable period of time.[33] The ability of certifying authorities under the 2020 Rule to request additional information did not effectively address information gaps. The CWA limits the "reasonable period" to not exceed one year, which can be a short window in which to request additional essential

[28] State of Michigan Department of Environment, Great Lakes and Energy comment letter submitted to Docket ID No. EPA-HQ-OW-2021-0302 on August 2, 2021.
[29] CWA §401(a)(1), 33 U.S.C. §1341(a).
[30] 85 Fed.Reg 42210, 42243 (July 13, 2020).
[31] 87 Fed.Reg. 35318, 35332 (June 9, 2022).
[32] *Id.* at 35334.
[33] 85 Fed.Reg. 42210, 42245 (July 13, 2020).

information from the project proponent and complete a meaningful water quality analysis. Some agencies, such as EPA and the Army Corps of Engineers, further shorten the presumed reasonable period to sixty days, considerably less than the already short period of one year.[34]

NAWM believes the Proposed Rule proposes a more workable approach to defining a certification request. One of the challenges of section 401 certification is that the statute does not provide when such certification should occur or how it fits into the licensing or permitting process. By establishing a draft permit or license as a required element of a certificate request, the Proposed Rule indicates certification should occur after data and analyses on a proposed project's water quality impacts have been developed. Monitoring data, an environmental assessment (EA), and an environmental impact statement (EIS) are examples of the types of data that likely would be available at the point a draft license or permit has been developed, and such information would be helpful to a state or tribal certifying authority doing a certification analysis. Several of NAWM's state members are supportive of the requirement, indicating that a draft license or permit as part of a certification request would help ensure substantial information about the project is available at the point the certification process starts and help result in an informed decision. However, others are concerned that delaying start of the certification process until a draft license or permit is available will prevent state and tribal certification authorities from engaging with project proponents and federal agencies early in the process. Also, the most frequent federal action requiring certification, section 404 and section 10 permits, do not issue draft permits. For this reason, some state and tribes have indicated they prefer a requirement that the request for certification include the application for a license or permit rather than a draft license or permit, thereby supplemented by other information as may be deemed necessary by the certifying agency to make a decision, allowing the certifying authority to engage with other parties earlier.

Recommendation: NAWM supports the Proposed Rule clarifying where in the licensing or permitting process section 401 certification should occur. Requiring the certification request to include a draft license or permit helps ensure water quality-related data on the project is available at the point the certification process begins. However, NAWM is concerned this requirement could reduce opportunities for the state or tribal certifying authority to engage with project proponents and federal agency early in the process. As a result, NAWM believes the Final Rule should include a copy of the application for the federal license or permit in the list of what constitutes a certification request, along with other information deemed appropriate by the certifying agency. In addition, NAWM encourages EPA to include in the Final Rule preamble a discussion of the importance of early engagement by all involved parties.

3b. Flexibility Allowing Certification Authorities to Add Requirements to a Request for Certification is Important for an Informed Analysis

The Proposed Rule provides that a certification request must include any "existing and readily available data related to water quality impacts from the proposed project" in addition to a copy of the draft license or permit.[35] State and tribal certifying authorities may through rulemaking establish additional

[34] 40 C.F.R. §124.53(c)(3) (reasonable period of time in the NPDES permit program is 60 days from the date the draft permit is mailed to the certifying State agency); 33 C.F.R. §325.2(b)(1)(ii) (Corps assumes waiver in section 404 program if certifying agency fails or refuses to act on a request for certification within sixty days after receipt). Both agencies allow an extension beyond the sixty-day period if unspecified circumstances may reasonably require a longer period not to exceed one year, and the Corps regulations also provide Districts may shorten the sixty-day period. *Id.*

[35] 87 Fed.Reg. 35318, 35331—35333 (June 9, 2022).

requirements for a request for certification. The Proposed Rule also indicates a short list of required elements developed for when EPA is the certifying authority would apply until the state or tribe defined a request of certification in regulation.[36] The list of required elements for EPA contains primarily ministerial data such as contact information and a list of federal, state, tribal, and local authorizations required for the project.

NAWM supports the flexibility in the Proposed Rule created by allowing states and tribes to further define a request for certification. It would be difficult for EPA to develop a national list of required elements that would fit all state and tribal regulations, project types, and potential water quality impacts. However, some NAWM state members have expressed concern about how long state rulemaking processes can take to complete, and that in the meantime the EPA list of required elements are primarily ministerial and might not ensure adequate project and water quality information would be available at the point the certification process begins. As was found to be the case under the 2020 Rule, the certification "reasonable period of time" is too short to ensure certifying authorities can request and receive additional information necessary to inform a certification analysis.

In conversations with states and tribes, NAWM has heard that they support the proposal's provision that allows certifying authorities to define what is a "request for certification," and believe it will help ensure comprehensive review under section 401. State and tribal regulations and public statements have identified some of the types of information necessary for a meaningful section 401 water quality analysis, which they likely would consider when defining "request for certification." These include: (1) information on all of the project's potential impacts to water quality, including effects on the water's chemical, physical, and biological integrity; (2) whether and to what extent the project might involve multiple discharges into the same receiving waters that could have cumulative effects; (3) methods of construction and operating procedures; (4) description of compensatory mitigation actions to offset foreseen impacts; and (5) preconstruction monitoring or assessment data of resource condition. Additional necessary information varies from project to project, depending on the project type and potential impacts.[37] Some of these site-specific information requirements might arise from other application requirements of state wetland and water permits, which relate to potential discharges affecting water quality, such as:

- Appropriately sized site plans showing location of unregulated and regulated water resources, including wetlands and discharges; property lines, sites where data was collected; mean high water and mean low water lines; navigation channels; and existing and proposed structures;
- Photographs and data sheets from field investigations;
- Maps and descriptions of other suitable sites where the discharge may be undertaken with fewer potential impacts;
- Specialized field surveys for water quality and living resources which are part of designated uses;
- Other watershed, basin, or flood management plans related to improving or maintaining water quality;
- Hydrologic and hydraulic computations which may be used to determine effects of potential discharges;
- Stormwater management plans;
- Erosion and sediment control plans;
- Methods of dredging and disposal sites;

[36] 87 Fed.Reg. 35318, 35335 (June 9, 2022).
[37] https://nawm.org/pdf_lib/aswm_comment_letter_401_072921.pdf

- Tests for potential contaminants in waters or which may be released into waters;
- Monitoring and maintenance plan and schedule, as determined by the certifying agency;
- Plan for addressing inadvertent returns of material into waters;
- Plan to manage the discharge for climate resiliency;
- Construction methods;
- Mitigation proposals;
- Considerations and efforts to minimize adverse water quality effects to disadvantaged/environmental justice communities; and
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- Communication documentation to disadvantaged/environmental justice communities about the project and potential for discharges to affect water quality.

Recommendations: NAWM strongly supports the Proposed Rule's provision that states and authorized tribes may identify additional elements required for a certification request, and recommends EPA includes the provision in the Final Rule.

4. **Reasonable Period of Time**

CWA section 401 indicates that a state or tribe waives its certification authority if it "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request."[38] The CWA is silent on who should set the reasonable period of time.[39] The 2020 Rule defined "reasonable period of time" (RPT) as "the time period during which a certifying authority may act on a certification request,"[40] established by the federal licensing or permitting agency either categorically or on a case-by-case basis.[41] The 2020 Rule provided that certifying authorities or project proponents may request an extension but the period may not exceed one year from receipt.[42] Under the Proposed Rule, the RPT is set by the federal agency and certifying authority within thirty days of receiving a request for certification, and may not exceed one year.[43] If the federal agency and certifying authority are unable to agree on an RPT, the RPT would default to sixty days.[44] The proposal also provides that the federal agency and certifying authority may agree to extend the RPT, in consultation with the project proponent, provided the RPT does not exceed one year.[45]

4a. Collaboratively Setting the RPT Can Help Ensure Adequate Time for an Informed Analysis, but the Default Sixty-Day Period Raises Issues

NAWM agrees it is important for the project proponent, certifying authority, and federal licensing or permitting agency to unambiguously understand when the reasonable period of time has started and when

[38] CWA §1341(a)(1); 33 U.S.C. §1341(a)(1).
[39] *Id.* EPA acknowledges the CWA silence in its preamble to the 2020 Rule, noting "[T]he statutory language of section 401 provides that a certification shall be waived if the certifying authority fails or refuses to act within the reasonable period of time, but the statute is silent on who should set the reasonable period of time." 85 Fed.Reg. 42210, 42259 (July 13, 2002).
[40] 40 C.F.R. §121.1(l); 85 Fed.Reg. 42210, 42258-61 (July 13, 2002).
[41] *Id.*
[42] 40 C.F.R. §121.6(d); 85 Fed.Reg. 42210, 42260 (July 13, 2020).
[43] 87 Fed.Reg. 35318, 35337 (June 9, 2022).
[44] *Id.*
[45] *Id.*

it will end. NAWM believes the Proposed Rule is indeed an improvement over prior regulations with its federal-state-tribal collaborative approach for setting the RPT. When a federal agency and a certifying authority are setting the reasonable period, NAWM suggests they could consider factors such as the proposed project type, complexity of the proposed project, location and scale of the proposed project, the nature of any potential discharge, the potential need for additional study or evaluation of water quality effects from the discharge, and the certifying authority's administrative procedures and notice requirements.

Several states have expressed concern about the proposal's sixty-day default RPT where the federal agency and certifying authority are unable to reach agreement. For some agencies (such as the Army Corps) with existing practice establishing a sixty-day RPT default, the process allows an agency to continue existing practice just by not reaching agreement. States and tribes also have expressed concerns that sixty days is too short to complete internal analyses and public notice requirements, noting that only thirty days of the RPT are left when the RPT negotiating period has ended.

Some states and tribes share that 90 days or longer is a more appropriate length of time for certification analyses for individual permits, especially for complex projects. Utah notes that while (prior to the 2020 Rule) the state usually issued certification decisions within 80 days of receiving an application, "complex decisions may have required more review and/or discussion with the project proponent to reach a set of conditions that protect water quality without interfering with the project purpose."[46] States and tribes argue that the RPT should be permit-based with the potential for different RPTs based on whether it is a general permit or an individual permit. Requiring too short of an RPT will lead to a greater likelihood of denials with prejudice. For example, in Washington State, they receive on average four hundred 401 certifications requests annually – "each request is different and carries unique implications that must be examined based on the specific characteristics of the water bodies and proposed project and federal permit in question."[47] However, some require more time than others because they are "unusually complicated or the project proponent fails to furnish significant information." The RTP, in these cases, needs to be set in ways that allow consideration of individualized circumstances.

The Proposed Rule has provisions that address some, but not all, of these state and tribal concerns. For example, concerns about the RPT being too short for required public notice likely are addressed in part by the RPT being automatically extended when a certifying authority notifies the federal agency either of a force majeure event or that more time is needed to satisfy public notice requirements.[48] It seems unclear, however why these factors were not already considered during the thirty-day RPT negotiation between the federal agency and certifying authority.

Concerns about a default to a sixty-day RPT (with only thirty days after expiration of the negotiating period) are not fully addressed in the proposal. As an alternative, states have suggested that if the federal agency and certifying authority are unable to reach agreement about the RPT, the certifying authority should have the power to set the RPT provided the period does not exceed one year. The state or tribe is more familiar with their water quality standards and other water quality requirements, their aquatic resources, potentially affected state or tribal waters, and what review time is needed based on project

[46] State of Utah Department of Environmental Quality Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302)
[47] State of Washington Department of Ecology Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302)
[48] 87 Fed.Reg. 35318, 35349-41 (June 9, 2022).

complexity and wetland impacts. As the proposal notes, "the CWA does not define what length of time is 'reasonable'"[49] nor discuss who sets the RPT. As a result, certifying authorities having authority to set an RPT when negotiations with the federal agency fail to reach agreement would be fully consistent with the CWA.

Recommendations: NAWM strongly supports the Proposed Rule's collaborative approach to setting the RPT, with the federal agency and certifying authority negotiating an appropriate RPT. NAWM believes, however, that an automatic default of sixty days if the agencies fail to reach agreement is both too short and too easily manipulated. Instead, NAWM recommends that in circumstances where an agreement about the length of the RPT has not been reached, the certifying authority determines the length of the RPT provided it does not exceed one year.

4b. "Acting on a Request for Certification" Requires a Clear Definition

CWA section 401 requires a certifying authority to "act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request."[50] The phrase "act on a request for certification" is not defined in the CWA nor was it defined in the 1971 and 2020 certification rules. The Proposed Rule defines the phrase as making one of the four certification decisions (grant, grant with conditions, deny or waive).[51]

Because failure to act within the RPT would be interpreted as a constructive waiver, it is very important for states and tribes to understand clearly what is meant by "act on a request for certification." One interpretation is that reflected in the proposal: to grant, grant with conditions, deny, or waive certification. However, at least one court has suggested that the section 401 phrase "to act" could be interpreted to mean something different than a final agency action on a request for certification.[52] According to the court, if a certifying authority has taken "significant and meaningful action" and "in good faith takes timely action to review and process a certification request," the certifying authority would not lose its authority to certify even if it takes longer than a year to make its final certification decision.[53] Several states have indicated they believe "to act" within the RPT does not require a final certification decision, and support the broader interpretation of some courts. Others, including some states and many project proponents, believe that considering "to act" as being any "significant and meaningful action" would be a source of significant uncertainty and at best a subjective standard.

NAWM believes "act on a request for certification" must be defined in an unambiguous and objective manner, to avoid confusion whether the certifying authority has acted or constructively waived its certification authority. While the proposed definition of "act on a request for certification" raises some implementation issues, such as the difficulty of evaluating a large complex project within the RPT, the proposed definition does provide an explicit endpoint.

Recommendation: NAWM believes the proposed definition of "act on a request for certification" provides a necessary clear endpoint for the RPT and should be reflected in the Final Rule.

[49] 87 Fed.Reg. 35318, 35336 (June 9, 2022).
[50] CWA §401(a)(1), 33 U.S.C. §1341(a)(1).
[51] 87 Fed.Reg. 35318, 35350 (June 9, 2022).
[52] *North Carolina DEQ v. FERC,* 3 F.4th 655 at 672, 676 (4th Cir. 2021).
[53] *Id.*

4c. Stopping and Restarting the RPT is Necessary in Some Circumstances

Another issue raised by the RPT is the circumstances under which the RPT may be stopped and restarted once it has begun by withdrawing and resubmitting the certification request. The proposed rule does not take a position on the legality of this practice. As the Proposed Rule preamble notes, "[w]hile there may be situations where withdrawing and resubmitting a certification request is appropriate, drawing a bright regulatory line on this issue is challenging and the law in this area is dynamic."[54] The Proposal Rule asserts that "certifying authorities are free to determine on a case-by-case basis whether and when withdrawal and resubmittal of a certification request is appropriate. Such determinations are ultimately subject to judicial review based on their individual facts."[55] The Proposed Rule notes that certifications are ultimately subject to judicial review broadly, including the withdrawal-resubmission practice.[56]

Many of NAWM's member states and tribes call for more flexibility in situations involving unexpected and significant changes in the project, which could be addressed by pausing or restarting the RPT. As a result, NAWM supports the Proposed Rule's discussion that observes circumstances may exist where restarting the RPT is appropriate, and agrees this area of the law is dynamic. NAWM believes, however, development of the law in this area would be aided by EPA establishing regulations specifically authorizing withdrawals and resubmissions, providing in the preamble illustrative factual situations where such an action would be appropriate. Without parameters on the practice provided by EPA, the more than ninety U.S. District Courts could make this important area of section 401 less clear, not more.

Recommendation: NAWM recommends the Final Rule specifically provide in rule text that withdrawal and resubmission of a certification request is appropriate in some circumstances, with illustrative examples of those circumstances.

5. **Scope of Certification**

Congress did not provide a single unambiguous definition of the appropriate scope of section 401.[57] The 2020 Rule concluded that section 401 focused on addressing water quality impacts from potential or actual discharges from federally licensed or permitted projects,[58] and that certifying authorities could consider in its certification "the applicable provisions of [sections] 301, 302, 303, 306, and 307 of the Clean Water Act, and state or tribal regulatory requirements for point source discharges into waters of the United States."[59] In contrast, the Proposed Rule expressly focuses not just on impacts of a proposed discharge but on water equality effects of the "activity as a whole."[60] EPA defers to states and tribes to define which of their water quality-related provisions qualify as appropriate "state laws" or "tribal laws" for purposes of implementing section 401.[61]

[54] 87 Fed.Reg. 35318, 335341 (June 9, 2022).
[55] *Id.*
[56] *Id.*
[57] *See, e.g.,* 85 Fed.Reg. 42210, 42250 (June 13, 2020).
[58] *Id.*
[59] 40 C.F.R. §121.1(n). §§301, 302, and 306 address appliable effluent limitations for existing and new sources; §303 addresses water quality standards; and §307 addresses toxic pretreatment effluent standards.
[60] 87 Fed.Reg. 35318, 35342-3 (June 9, 2022).
[61] 87 Fed.Reg. 35318, 35349 (June 9, 2022).

5a. Scope of Certification Analysis Should Be Broad

The preamble to the Proposed Rule emphasizes that the scope of a certifying authority's review is not limited to water quality effects on waters of the United States, or to water quality effects caused by point sources.[62] In the preamble, EPA emphasizes that considerations must address water quality effects, such as building and maintaining fish passages, maintaining minimum flow rates, compensatory wetland and riparian mitigation, and construction of recreation facilities.[63] Beyond the scope of water quality effects would be environmental or societal impacts not related to water quality, such as potential air quality, traffic, noise, or economic impacts with no connection to water quality.[64]

NAWM believes interpretations of the analytical scope of section 401 have a direct effect on the usefulness of certification as a water quality tool to help achieve CWA goals. When thinking about the scope of section 401 water quality certification, NAWM has found it helpful to consider a quote from a 10th Circuit Court of Appeals decision: "…in construing the Act, 'the guiding star' is the intent of Congress to improve and preserve the quality of the Nation's waters. All issues must be viewed in the light of that intent."[65] As a result NAWM strongly supports the Proposed Rule's broad interpretation of the scope of a certification analysis as including impacts to non-federal waters and impacts from nonpoint sources, among others.

States and tribes have raised concerns to NAWM and others that, under the 2020 Rule many important water quality impacts were deemed to be beyond the scope of 401 certification analysis. Among others, these impacts included increased water withdrawals, stream flows, aquatic habitat loss, contamination of groundwater supplies, increased erosion and sedimentation, reduced stormwater infiltration, disconnected ecosystems, contaminant loading from spills, and harm to endangered species.[66] For example, in Washington State, hydropower projects "implicate a broad range of water quality impacts from the project as a whole that are unassociated with any specific point source discharge. Dams specifically contribute to increased water temperature from decreased water flows within streams and decreased flow rates caused by ponding behind dam structures. Dam reservoirs also cause resuspension of shoreline sediments due to wave action and pool fluctuations and overall vegetation loss, reduced shading and increasing temperatures."[67]

It is essential that the Final Rule retain a broad interpretation of the scope of 401 certification analysis. In addition to the examples of appropriate considerations listed in the proposed preamble, the Final Rule should explicitly include impacts from nonpoint sources as well as aquatic resource impacts resulting from climate change or required adaptation to climate change. Nonpoint sources remain one of the principal sources of water quality impairments in assessed waters, and NAWM supports the proposal's

[62] 87 Fed.Reg. 35318, 35348 (June 9, 2022).
[63] *Id.*
[64] 87 Fed.Reg. 35318, 35343 (June 9, 2022).
[65] *Kennecott Copper Corp. v. Envtl. Prot. Agency*, 612 F.2d 1232, 1236 (10th Cir. 1979) (quoting *Am. Petroleum Institute v. Envtl. Prot. Agency*, 540 F.2d 1023, 1028 (10th Cir. 1976).
[66] Association of State Wetland Managers Comment Letter on Notice of Intention to Reconsider and Revise the Clean Water Act Section 401 Certification Rule submitted to Docket ID No. EPA-HQ-OW-2021-0302 on July 30, 2022.
[67] State of Washington Department of Ecology Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 July 30, 2022).

inclusion of nonpoint source provisions in "water quality requirements."[68] Climate change also has important impacts on aquatic resources, such as increased drought affecting flow regimes, increasing number of storm events and flooding,[69] sea level rise, habitat losses, and aquatic species impacts.

Recommendation: NAWM strongly supports the Proposed Rule's interpretation of appropriate scope of consideration for a certification analysis. "Water quality effects" should be interpreted broadly and should include impacts on non-federal waters, as well as impacts from nonpoint sources and foreseeable climate impacts on water resources and quality, in order to attain the goals of section 401 and the CWA. NAWM also supports the Proposed Rule's deference to states and tribes to determine what provisions qualify as appropriate state or tribal laws for purposes of implementing section 401.

5b. Focus on Activity as a Whole, versus the Discharge, is Appropriate

The Proposed Rule reverses the 2020 Rule's interpretation of *Jefferson County PUD No. 1*[70], the 1994 decision addressing the appropriate scope of analysis for section 401 certification, and concludes the proper scope of analysis is the activity as a whole.

In *Jefferson County*, the U.S. Supreme Court considered the appropriate scope of analysis for section 401, and concluded it encompassed the project as a whole and was not limited to water quality controls specifically tied to a discharge.[71] The Court noted that section 401 "allows [certifying authorities] to impose 'other limitations' on the project in general to assure compliance with various provisions of the Act and with 'any other appropriate requirement of State law.'"[72] As a result, while section 401(a)(1) "identifies the category of activities subject to certification—namely, those with discharges"-- the Court held section 401(d) authorizes additional conditions and limitations "on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."[73]

In the preamble to the 2020 Rule, EPA explained that the terms "discharge" as set out in section 401(a) was ambiguous, and thus EPA's interpretation of the term and its relationship to section 401(d) was entitled to *Chevron* deference.[74] [75] Yet, the majority in *Jefferson County PUD* did not identify what portion of the CWA was ambiguous. This is because there was no ambiguity; the plain language of CWA

[68] *See* 87 Fed.Reg. 35318, 35347 (June 9, 2022).

[69] The northeast United States has seen the largest increase in intensity and frequency of heavy precipitation events and resulting in "Increased sediment and nutrient inputs due to extreme storm events." *See, e.g.,* https://news.climate.columbia.edu/2019/09/23/climate-change-impacts-water/. Additionally, "climate change threatens the quality of source water through increased runoff of pollutants and sediment, decreased water availability from drought and saltwater intrusion, as well as adversely affecting overall efforts to maintain water quality." *See, e.g.,* https://www.epa.gov/arc-x/climate-adaptation-and-source-water-impacts.

[70] *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology,* 411 U.S. 700 (1994).

[71] *Id.*

[72] *Id*. at 711.

[73] *Id*. at 711-12.

[74] 85 Fed.Reg. 42210 42251-53 (July 13, 2020).

[75] *See Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), for a discussion of a two-step analysis for determining whether an agency interpretation of the statute is entitled to deference. In step one, a court will seek to determine if Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter for courts and agencies must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, that the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

section 401 is clear and as a result Congress's intent must be followed. For twenty-six years prior to the 2020 Rule, agencies and certifying authorities interpreted section 401 as addressing impacts of an activity as a whole, and therefore that interpretation is well-understood and capable of consistent and predictable implementation. Also, considering all potential water quality impacts resulting from issuance of a federal license or permit helps ensure 401 certification remains an effective water quality tool and, as Congress intended, that federal licensing or permitting agencies cannot override state or tribal water quality requirements.

For example, Utah has adopted water quality standards to protect groundwater in the state. These standards do not require EPA approval because ground water is not a water of the United States[76]. Utah has used 401 certification authority to condition impacts to aquifer systems that are clearly connected to impaired surface waters. The state's conditions were designed to protect downstream waters without unnecessarily restricting activities. The Navajo Nation and other tribes point specifically to the essential need to include water quality threats beyond direct discharges, including alteration of groundwater and surface flow.[77]

Recommendation: **NAWM strongly supports the Proposed Rule's analysis of *Jefferson County* and believes the Final Rule should establish the scope of analysis is the activity as a whole, not just the discharge.**

6. **Certification Decisions**

Under CWA section 401, a certifying authority has four options when concluding a certification analysis. The certifying authority may grant the certification, grant the certification with conditions, deny certification, or waive its certification authority either expressly or through passage of time.[78]

The 2020 Rule limited the scope of certification conditions to those within the rule's narrowed scope of certification analysis. The 2020 Rule also established specific documentation and explanation requirements for 401 certification actions including granting certification with conditions and denying certification. For conditioned certifications, the certifying authority was required to explain why the condition was necessary to assure the proposed project would comply with water quality requirements, and provide legal citations authorizing the condition.[79] For denied certifications, the certifying authority had to identify the specific water quality requirements with which the discharge will not comply and an explanation of why, and if the denial was due to insufficient information, the certifying authority needed to identify the specific data that would have been necessary to assure that the project's discharge would comply with water quality requirements.[80] If the certification condition or denial did not include the required information, the certification condition or denial was to be considered by the federal licensing or permitting agency as waived.[81]

[76] State of Utah Department of Environmental Quality Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 Submitted July 30, 2022)
[77] The Navajo Nation Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 on September 7, 2021)
[78] CWA section 401(a)(1); 87 Fed.Reg. 35318, 35349-50 (June 9, 2022).
[79] 40 C.F.R. §121.7(d)(1).
[80] *Id.*
[81] 85 Fed.Reg. 42210, 42263 (July 13, 2020).

The Proposed Rule establishes more limited content requirements than the 2020 Rule for documenting a certification decision. Any grant of certification must indicate the federally licensed or permitted activity "will comply" with water quality requirements.[82] A grant of certification with conditions must identify any conditions necessary to assure that the activity as a whole will comply with water quality requirements, and include a statement why each condition is necessary to assure the activity as a whole will comply with water quality requirements.[83] Denial of certification should contain a statement explaining why the certifying authority cannot certify the proposed activity as a whole will comply with water quality requirements.[84] Express waiver should clearly state the certifying authority is waiving its authority to act on a request for certification.[85] The Proposed Rule does not retain the 2020 Rule's specific documentation and explanation requirements, instead calling for a more general explanation of, for example, why each condition is necessary to ensure compliance with water quality requirements or why a denial is necessary. The Proposed Rule also does not place specific limitations on conditions, noting "EPA does not interpret the statute as allowing a Federal agency to … question certifying authority conditions."[86]

6a. Requirements for Specific Citations and Explanations Have Been Burdensome.

Unlike the 2020 Rule, the Proposed Rule does not require certification authorities to provide specific statutory or regulatory citations in support of a certification condition or denial.[87] Instead, the Proposed Rule allows certification authorities to decide what relevant information to provide in support of any conditions.[88]

Many states and tribes found the 2020 Rule's documentation requirements as burdensome and with limited water quality benefit. As indicated in the Proposed Rule's preamble, several certifying authorities found that the documentation requirements delayed rather than streamlined the certification process.[89] One example of the problems with this approach can be seen with the 2020 Nationwide General Permit (NWP) review process.[90] The 2020 Rule in effect gave federal agencies veto power over certifying authorities' certification decisions. The Corps, consequently, sought certification on a NWP package in September 2020. Many Corps districts reviewed the substance of some of the resulting certification conditions and concluded the conditions were impermissible "reopener clauses." States have told NAWM that some districts believe the disputed condition as invalid while considering the balance of the certification as valid, other districts believed the disputed condition resulted in a certification denial and part of their review in at least one district redrafted a certification condition. The process was not predictable, transparent, or consistent and resulted in substantive changes to certifications not envisioned by the CWA. In addition, NAWM is aware of certifying authorities whose conditions were not only

[82] 85 Fed.Reg. 35318, 35353 (June 9, 2022.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] 87 Fed.Reg. 35318, 35349 (June 9, 2022).
[87] 87 Fed.Reg. 35318, 35353 (June 9, 2022).
[88] *Id.*
[89] 87 Fed.Reg. 35318, 35352 (June 9, 2022).
[90] Association of State Wetland Managers Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 on June 30, 2021)

rejected but subjected to a Corps-established new category of action "decline" or "decline to rely on" by the federal agency. Such an option is not provided in CWA Section 401.[91]

As a result of this state and tribal experience, the Proposed Rule's more general approach to documentation and explanation of certification actions is appropriate and fully consistent with section 401 and CWA goals. The 2020 Rule's documentation requirements created an unnecessary administrative burden, particularly because the federal agencies' review of documentation was only to verify its presence. We do note, however, that some states do not support any requirement for documentation of a certification decision, however general.

Recommendation: NAWM supports the more general explanation and documentation requirements in the proposed Certification Improvement Rule, and recommends they be reflected in the Final Rule. In addition, the Final Rule preamble should reiterate that the federal licensing or permitting agency will defer to the certifying authority's explanation and documentation and not make an evaluation of its adequacy.

7. **Federal Agency Review of Certification Decisions**

The CWA does not address the process of federal agency review of section 401 certifications.[92] EPA has over the years attempted to clarify through regulation the scope of agency review.

Under the 2020 Rule, the federal licensing or permitting agency reviewed actions by a certifying authority to determine whether it complied with the procedural and documentation requirements for those actions, and whether the action was completed within the RPT.[93] The federal agency was not required to provide a certifying authority an opportunity to remedy any deficiency. Federal agency review did not include a substantive evaluation of the sufficiency of information provided in the certification.[94] If a certification condition or denial did not follow procedural requirements, the condition was considered waived and not incorporated into the resulting permit or license and a denial was considered to be a waiver.[95]

The Proposed Rule establishes a narrower role for the federal licensing or permitting agency, indicating "[f]ederal agencies may review a certification decision only for the limited purpose of ensuring that the decision meets a handful of facial statutory requirements."[96] The federal agency reviews a certification to see if it reflects four elements: (1) indicates the action taken (grant with or without conditions, deny, waive), (2) the proper certifying authority issued the decision, (3) public notice requirements for the certification were met, and (4) the decision was issued within the RPT. Federal agency review may not go beyond these four elements. The federal agency defers to the certifying authority how to demonstrate it met the four required elements.[97] The proposal does not include a provision allowing a federal agency to

[91] *Id.*
[92] 87 Fed.Reg. 35318, 35356 (June 9, 2022).
[93] 85 Fed.Reg. 42210, 42263 (July 13, 2020).
[94] "The preamble to the 2020 Rule describes the federal role as administrative: federal agencies are not called on to "substantively evaluate or determine whether a certification action was taken within the scope of certification … this federal agency review is entirely procedural in nature." 85 Fed.Reg. 42210, 42267 (July 13, 2020).
[95] 85 Fed.Reg. 42210, 42263 (July 13, 2020).
[96] 87 Fed.Reg. 35318, 35354 (June 9, 2022).
[97] 87 Fed.Reg. 35318, 35356 (June 9, 2022).

convert a conditioned certification or a denial to be a waiver based on failure to submit documentation or follow procedures.

7a. Limited Federal Review Role is Consistent with the CWA

During pre-proposal discussions and consultations, several state and tribal stakeholders indicated that the 2020 Rule contradicted the text of CWA section 401 and its legislative history. They argued the ability to convert any certification decision into a waiver if procedural requirements were not met provided the federal licensing or permitting agency with an effective certification veto, and the rule provided no opportunity for the certifying authority to fix errors or submit supplemental explanatory information.[98]

Caselaw has held that the CWA does not authorize agencies to replace a stated certification condition. For example, the 4th Circuit Court of Appeals has held that the "plain language of the Clean Water Act does not authorize the Corps to replace a condition with a meaningfully different alternative condition, even if the Corps reasonably determines that the alternative condition is more protective of water quality."[99] Nonetheless, state and tribal certification authorities have seen the Corps revise certification conditions. During the certification process for the 2021 package of section 404 Nationwide General Permits (NWPs), certifying authorities say the Army Corps revised some of their conditions. Certifying authorities also have reported that the Army Corps considered some of those conditions to be reopener clauses and therefore unacceptable under the 2020 Rule, even when they were not reopener clauses but merely clarifying what permits were addressed by the certification. As Washington State writes in their July 30, 2021, comment letter to EPA, the WA Department of Ecology "experienced this firsthand when we recently learned that the Corps incorrectly interpreted one of our state certification conditions in the Nationwide Permit Program renewal as a reopener and therefore 'declined to rely on' our Section 401 certification decisions for the nationwide permits." This decision would "force Ecology to issue individual 401 certifications for hundreds, even thousands, of projects annually that would otherwise have fallen under programmatic 401 certifications."[100]

The Proposed Rule defers to the state or tribal certifying authority in how to demonstrate compliance with the four required elements in a certification, observing "certifying authorities are the entities most familiar with their certification process, and … are in the best position to determine how to demonstrate compliance" with the four elements.[101]

CWA section 401 is a direct grant of authority to states and authorized tribes, and not a program subject to EPA review and approval. As a result, the role of federal agencies reviewing state or tribal certification decisions is a limited one. The Proposed Rule seems to establish an appropriately limited role for federal agencies, namely to ensure that the certification decision meets "a handful of facial statutory requirements."[102]

[98] 87 Fed.Reg. 35318, 35355 (June 9, 2022).
[99] *Sierra Club v. U.S. Army Corps of Engineers,* 909 F.3d 635, 648 (4th Cir. 2018).
[100] State of Washington Department of Ecology Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 on July 30, 2022).
[101] 87 Fed.Reg. 35318, 35356 (June 9, 2022).
[102] 87 Fed.Reg. 35318, 35354 (June 9, 2022)

Recommendation: NAWM believes the limited federal agency review role of certification decisions is appropriate and consistent with the CWA, and recommends the Final Rule reflect this limited role.

7b. Opportunity to Correct Certification Deficiencies is Essential

Under the 2020 Rule, the federal licensing or permitting agency could review a certification to confirm that certification requirements were met as a prerequisite to accepting the certification decision.[103] If the federal agency determined that a certifying authority failed or refused to comply with the documentation or procedural requirements of the 2020 Rule, the certification action would be waived and the state or tribal certifying authority would not be provided an opportunity to remedy the deficiency.[104] In contrast to the 2020 Rule, the proposed Certification Improvement Rule would allow the certifying authority to correct a deficiency with a certification within the RPT.[105]

Constructive waiver might occur when a certifying authority fails or refuses to act during the RPT, or under the 2020 Rule when required procedures and documentation were lacking. As noted in the Proposed Rule, "constructive waiver is a severe consequence … a waiver means the Federal license or permit may proceed without any input from the certifying authority."[106] Not only is waiver a "severe consequence," but conversion of a certification condition or denial to a waiver is inconsistent with CWA goals since those conditions or denials are necessary to protect water quality. States and tribes have emphasized the importance of an opportunity to correct certification deficiencies. States have noted that conversion of a certification decision to waiver because of perceived gaps in documentation is inappropriate, particularly in light of the fact the federal agency's review of documentation under the 2020 Rule is not substantive and is merely a ministerial exercise to verify the documentation was provided.

States and tribes continue to argue against the constructive waiver, citing that federal agencies do not have the authority to waive or reject Section 401 certifications or conditions.[107] They argue instead that states and tribes are in the best position to determine what is needed to ensure that state waters are protected and have the right to retain that role. Delegating review of a state's Section 401 conditions to a federal agency contradicts the CWA's plain language that conditions of 401 "shall become conditions of the federal permit" (33 U.S.C. § 1341(d)) and undermines the CWA framework of cooperative federalism.[108]

NAWM strongly supports the Proposed Rule's provision requiring the federal agency to notify the certifying authority of a certification deficiency and to provide an opportunity to remedy the noted deficiency. NAWM wishes to emphasize that any identified potential deficiency should be within the

[103] 85 Fed.Reg. 42210, 42277 (July 13, 2020).
[104] 87 Fed.Reg. 35318, 35355 (June 9, 2022).
[105] 87 Fed.Reg. 35318, 35357 (June 9, 2022).
[106] *Id.* at 35357.
[107] State of Washington Department of Ecology Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 on July 30, 2021)
[108] State of Washington Department of Ecology Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 on July 30, 2021).

limited federal agency review role. Because the opportunity to remedy must be within the RPT, NAWM believes it is important to emphasize in the Final Rule that the federal agency must notify the certifying authority immediately after the deficiency was identified. It also seems appropriate that the RPT be stopped when the certifying authority submits its certification, and that remaining time within the RPT or one year be available for remedying the deficiency.

Recommendation: NAWM recommends the Final Rule explicitly provide an opportunity to remedy deficiencies in the certification, using the remaining time in the RPT after the certifying authority originally submitted its certification to the federal agency (or, if necessary, additional time up to a total RPT of one year).

8. **Modifications of Certifications**

The CWA neither expressly authorizes nor prohibits modifications of certifications.[109] The 2020 Rule did not authorize or include any procedure for certifying authorities to modify certifications after issuance,[110] and prohibited the use of "reopener" clauses to modify requirements of a certification after it has been issued.[111] The preamble asserted that reopeners allow the certifying authority "to take an action to reconsider or otherwise modify a previously issued certification at some unknown point in the future."[112] The Proposed Rule allows a certifying authority to modify a certification after reaching an agreement to do so with the federal licensing or permitting agency. EPA would not be involved.[113] Under the proposed rule, a certification modification could occur after the RPT in which the original certification decision was made.[114] The proposed rule does not directly address reopener clauses.

8a. Modifications to Existing Certifications Help Ensure CWA and Section 401 Goals are Met

Many circumstances exist where a new certification or modification of an existing 401 certification would be appropriate. For example, if the project has changed materially after certification, such as the location or nature of the discharge is different from that certified, it may be appropriate to issue a revised or new license or permit which would be subject to a new 401 certification. However, not all changed circumstances would result in a new license or permit with an associated new certification. For example, a court may remand a certification or condition, the project proponent or the certifying authority may want to correct an error, the nature of the licensed or permitted discharge may change, the discharge location may change, or the federal, state, or tribal law upon which the certification is based may change. EPA's regulations governing certification of National Pollutant Discharge Elimination Program (NPDES) permits under CWA section 402 provide procedures for modifying certifications in certain circumstances.[115] The 2020 Rule preamble acknowledged the modification provision in the NPDES

[109] 87 Fed.Reg. 35318, 35361 (June 9, 2022).
[110] 85 Fed.Reg. 42210, 42278-80 (July 13, 2020)
[111] *Id.* at 42279.
[112] *Id.* at 42280.
[113] 87 Fed.Reg. 35318, 35361 (June 9, 2022).
[114] *Id.*
[115] 40 C.F.R.§124.55(b). Procedures allow modification if there is a change in the state law or regulation upon which a certification is based, or if a court or appropriate State Board or agency stays, vacates, or remands a certification.

certification program[116] yet failed to note presence in the NPDES program of any confusion, regulatory uncertainty, or other problems attributed to modification provisions.

An opportunity to modify an existing certification under circumstances such as these helps ensure that section 401 achieves its goal of ensuring that federal licenses and permits would be consistent with state and tribal water quality goals. Many states and tribes welcome an opportunity to modify an existing certification. They note that some minor changes, such as needing to shift the certified "work window" to reduce the amount of work occurring during high-flow periods, may not require a new certification but may be significant enough to warrant modification of the certification.[117] Similarly, for licenses allowing discharges over a period of decades, there must be an opportunity to address effects based on new conditions or information. In its 2021 pre-proposal comment letter, Maryland Department of the Environment noted "certifying entities may not be able to anticipate all effects from a discharge on water resources as new information may become available after the certification was issued, waived or denied. In this case, a new review and potential conditions would be necessary … MDE supports having the clear authority to reopen review of water quality certification decisions or modify certification decisions under the circumstances above." [118]

Under the 2020 Rule, a modification required the 401 and federal permitting process to start over. In their 2021 Comment Letter to EPA, Utah Department of Environmental Quality indicated that this process would include request for a pre-filing meeting, a 30-day wait period, federal permit public notice period, state review and associated fees, state public notice of draft decision, and neighboring jurisdiction review.[119]

States and tribes agree that the Proposed Rule is a significant improvement, by allowing adaptation and flexibility in circumstances where modifying an existing 401 certification would be appropriate. The ability to address modifications without initiating an entirely new license/permit and certification process significantly reduces the burden on both the permitters and permittees.[120]

Recommendation: NAWM believes an opportunity to modify existing certifications to reflect changes to the project or its discharge is consistent with the CWA and helps achieve the goals of section 401. As a result, NAWM recommends that the Final Rule include a provision allowing certifying authorities to modify existing certifications.

8b. Reopener Clauses Can Provide Predictable Flexibility

"Reopener" clauses are section 401 certification conditions that call for interaction with the state or tribe when a specified action or condition occurs. Reopener clauses can help ensure that water quality goals are met under changing conditions, and often are called 'adaptive management" conditions. For example, in the context of hydropower licensing, adaptive management is a process in which the licensee and stakeholders collaborate on "fine tuning" required environmental measures within a Commission prescribed range. Several states have included an adaptive management condition in their 401

[116] 85 Fed.Reg. 42210, 42279 (July 13, 2020).
[117] This example also is discussed in the preamble to the proposed Certification Improvement Rule. 87 Fed.Reg. 35818, 35361 (June 9, 2022).
[118] Maryland Department of Environment Comment Letter re Updating Regulations on Water Quality Certifications (Submitted to Docket ID No. EPA-HQ-OW-2019-0405-0025 on October 21, 2019, Attachment 1, p. 10)
[119] State of Utah Department of Environmental Quality. Comment Letter re Notice of Intent to Reconsider and Revise the Clean Water Act Section 401 Certification Rule (Submitted to Docket ID No. EPA-HQ-OW-2021-0302 on July 30, 2021).
[120] Feedback from states at NAWM listening session with member states and tribes on 7-13-2022.

certification for FERC hydroelectric licenses that require facility operators to get review and approval of a dredging management plan prior to dredging operations associated with the dam. Some states include a certification provision for reassessment when water quality standards for the receiving water have changed, or additional mitigation should the project impact more wetlands than originally estimated. Adaptive management in general helps to anticipate and address potential future changes in the circumstances used as the basis for the 401 certification decisions.

As mentioned above, the 2020 Rule prohibited reopener clauses and the Proposed Rule does not appear to discuss reopener clauses although it does provide an opportunity to modify existing certifications. Reopener clauses can play a different role than modifications because of their "if-then" construction. For example, if a "reopener" condition for a hydroelectric dam provides that a maintenance dredging plan must be approved in advance by the state certifying authority, the certifying authority will be notified when such a plan is being developed and both the project proponent and certifying authority can anticipate both timing and substance of resulting discussions. This is not the situation that led the 2020 Rule to prohibit reopener clauses; it is not an invitation to some action by a certifying authority at some unknown point in the future, but a predictable process.

Generally, certifying authorities do not label conditions as a "reopener clause," so the federal agency may feel obligated to make a substantive judgement as to the nature of a condition and sometimes misinterpret appropriate conditions as reopeners prohibited under the 2020 Rule. For example, in September 2020 the Corps of Engineers required certification of proposed section 404 Nationwide Permits (NWPs) rather than of final permits. In response, several certifying authorities indicated that their certification applied to the NWPs as proposed and may not apply to final NWPs if the final permits differed substantively from proposal. Such a statement clarified the federal action to which the certification applied. Regardless, some Corps districts interpreted the statement as a prohibited reopener clause and rejected the certification, even though the statement did not involve taking action at 'some unknown point in the future.'"

Reopener clauses such as those discussed above would not be what the 2020 Rule preamble was raising concerns about, namely an invitation for some action by a certifying authority at some unknown point in the future. Instead, these reopener clauses would be explicit in their trigger ("if") and response action ("then"), and could accommodate changes to the project or its discharge, changes in the laws forming the basis of the certification, or other specific changes that potentially affect water quality and therefore should be included in the certification. Such focused reopener clauses also would reduce the number of situations where a certifying authority might seek to modify an existing certification.

Recommendation: NAWM supports the use of reopener clauses (also known as adaptive management conditions) that provide a bounded "if-then" description of future triggering events and associated responsive actions. NAWM recommends the Final Rule expressly allows reopener clauses.

9. **Enforcement**

Section 401 certification includes three provisions directly related to enforcement. First, section 401 provides certification authorities with an opportunity to inspect a certified federally licensed or permitted project prior to operation to ensure its operation will not violate a water quality requirement.[121] Second, section 401 provides that any certified federal license or permit may be "suspected or revoked" by the federal agency when a judgment has been entered finding that such project has been operated in violation

[121] CWA §401(a)(4), 33 U.S.C. §1341(a)(4).

of CWA provisions.[122] Finally, section 401 provides that certification conditions "shall become a condition on any Federal license or permit subject to the provisions of this section."[123]

This letter does not address all enforcement issues associated with section 401, instead focusing on the enforceability of certification conditions, and relevance of CWA's citizen suit provision to enforceability of certification conditions.

The 2020 Rule reserved the enforcement role to the federal agency issuing the federal license or permit, providing that "the Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit." [124] The preamble to the 2020 Rule interpreted the CWA as not providing an independent regulatory enforcement role for certifying authorities, but allowed states and tribes to take enforcement actions where authorized under state or tribal law and not preempted by other federal statutory provisions.[125] The 2020 Rule did not change a federal agency's enforcement discretion, under which an agency can decide when to enforce and not enforce, "reserving limited enforcement resources for the cases that can make the most difference."[126]

The Proposed Rule does not retain the enforcement-limiting provisions of the 2020 Rule, but "is not offering new interpretations or positions on most of the issues" related to enforcement.[127] The preamble does note that section 401 certification conditions incorporated into a Federal license or permit are enforceable by the federal license or permitting agency,[128] and that federal agencies retain discretion about when and whether to enforce requirements and conditions in their licenses and permits.[129]

9a. State and Tribal Authority to Enforce Certification Conditions Must Be Clear

The Proposed Rule does not prohibit or encourage efforts by states and tribes to enforce a certification condition through section 401, through a condition's inclusion in a federal license or permit, or through the CWA's citizen suit provision. The preamble to the Proposed Rule does note that EPA "has consistently taken the view that nothing in section 401 precludes states from enforcing certification conditions when so authorized under state law,"[130] while observing that the 2020 Rule limited this state law-based enforcement to situations "where State authority is not preempted by federal law."[131] The result is extensive ambiguity regarding the context in which 401 certification conditions may be enforced. The result of this ambiguity is "stakeholder confusion," acknowledged in the preamble to the Proposed Rule.[132]

Recommendation: NAWM believes substantial ambiguity and confusion exists regarding state and tribal ability to enforce certification conditions. To increase clarity on this important issue, EPA's Final Rule should address enforceability in rule text and discuss at length in its preamble.

[122] CWA §401(a)(5), 33 U.S.C. §1341(a)(5).
[123] CWA §401(d), 33 U.S.C. §1341(d).
[124] 40 C.F.R. §121.11(c).
[125] *Id*. at 42275-6.
[126] *Id.*
[127] 87 Fed.Reg. 35318, 35363 (June 9, 2022).
[128] 87 Fed.Reg. 35318, 35364 (June 9, 2022).
[129] *Id,* citing *Heckler v. Cheney*, 470 U.S. 821, 831 (1985)(discussing why it is important for federal agencies to retain enforcement discretion.)
[130] 87 Fed.Reg. 35318, 35364 (June 9, 2022).
[131] *Id.*
[132] *Id.*

NAWM agrees with the Proposed Rule's conclusion that federal licensing and permitting agencies have authority to enforce conditions included in licenses and permits they have issued, and that the agencies retain their enforcement discretion. However, given the sometimes-heavy use of discretion that can result in limited enforcement, the ability of states and tribes to enforce their certification conditions takes on additional importance.

One area in need of clarity is an unequivocal statement in rule text that states and tribes may enforce certification conditions when so authorized under state or tribal law. Nothing in the CWA or section 401 removes state or tribal ability to enforce state or tribal laws. Indeed, the CWA does the opposite by expressly saying that nothing in the Act precludes the right of any state to adopt or enforce any standard or limitation respecting discharges of pollutants, unless expressly stated,[133] and nothing in the text of section 401 expressly limits enforcement of certification conditions by states.

The 2020 Rule's provision that only federal agencies may enforce 401 certification conditions contradicted CWA section 510. Section 510 preserves the right of any state to adopt or enforce "any standard or limitation respecting discharges of pollutants" and "any requirement respecting control or abatement of pollution" provided the standards, limitations, and requirements are at least as stringent as CWA requirements.[134] When what became section 401 was first proposed, Senator Muskie explained on the Senate floor why state certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution:

> "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements."[135]

The U.S. Supreme Court quoted Senator Muskie's explanation in its unanimous *SD Warren* decision and noted "[t]hese are the very reasons that Congress provided the States with power to enforce 'any other appropriate requirement of state law,' 33 U.S.C. 1341(d), by imposing conditions on federal licenses for activities that may result in a discharge."[136] The 2020 Rule chose to reject the unanimous U.S. Supreme Court viewpoint in *S.D. Warren.* In contrast, the Proposed Rule discusses *S.D. Warren* with approval in its preamble.[137]

Recommendation: NAWM strongly recommends that the Final Rule expressly state in rule text that states and tribes may enforce certification conditions when so authorized under state or tribal law.

9b. <u>The CWA citizen suit provision appears to provide an additional basis for state and tribel enforcement of certification conditions.</u>

[133] CWA §510, 33 U.S.C. §1370.
[134] CWA §510, 33 U.S.C. §1370.
[135] 116 Cong. Rec. 8984 (1970), quoted in *S.D. Warren Co. v Maine Board of Envtl Protection,* 547 U.S. 370, 385 (2006).
[136] *S.D. Warren Co. v. Maine Board of Envtl Protection,* 547 U.S. 370, 385 (2006).
[137] *See, e.g.,* 87 Fed.Reg. 35318, 35328-9, 35347 (June 9, 2022).

Under the CWA, any citizen may bring a civil action against any person who is alleged to be in violation of any effluent standard or limitation in the CWA, or against EPA where there is an alleged failure of the Administrator to perform any act or duty under the CWA including, among other things, "a certification under section 1341 [section 401]."[138] In addition to the general citizen suit provision, the CWA explicitly provides that a governor of a state may bring a civil suit where there is alleged an EPA failure to enforce a CWA effluent standard which is occurring in another State and is causing an adverse effect on the public health or welfare in their state, or is causing a violation of any water quality requirement in within the governor's state.[139] When a citizen suit is brought, the federal district courts have jurisdiction to enforce an effluent standard or limitation.[140]

The 2020 Rule prevented state and tribes from using citizen suits to enforce 401 certification conditions in a federal license or permit, apparently attempting through regulation and preamble to modify the CWA's statutory citizen suit provisions. Several federal district courts have held that certification conditions can be enforced through CWA citizen suits.[141] The preamble to the Proposed Rule explained that one court

> "reasoned that section 505 [the citizen suit provision] is the only provision of the CWA that could bestow Federal authority upon states to enforce certification conditions and, given this, interpreting section 505 to preclude state enforcement of certification conditions would run 'contrary to the CWA's purpose and framework." The preamble also acknowledges "EPA is not aware of any federal court that has considered the issue and reached the opposite conclusion."[142]

Limitations on enforceability such as those in the 2020 Rule are inconsistent with goals for the CWA and the plain language of section 401, conflicts with the enforcement provisions of CWA sections 505 and 510 and contradicts a unanimous U.S. Supreme Court decision.

Recommendation: NAWM recommends that the Final Rule provides in rule text that state and tribal certification authorities may enforce certification conditions that have become a condition in a federal permit or license, both under the CWA citizen suit provisions and state or tribal law.

10. **Neighboring Jurisdictions and CWA Section 401(a)(2)**

CWA Section 401(a)(2) establishes a process under which neighboring jurisdictions can be notified and have an opportunity to be heard about potential water quality implications of proposed projects undergoing certification. The process begins when a federal licensing or permitting agency notifies EPA that they have received a license or permit application and associated water quality certification.[143] EPA has 30 days to determine whether the discharge "may affect. . . the quality of the waters of any other State..."[144] If EPA determines that the discharge from the certified project may affect water quality in a

[138] CWA §506(f), 33 USC §1366(f).
[139] CWA §505(h), 33 USC §1365(f).
[140] CWA §505(a), 33 USC §1365(a).
[141] *See, e.g., Deschutes River Alliance v. Portland Gen. Elec. Co.,* 249 F.Supp. 3d 1182, 1188 (D. Or. 2017); *Pub. Emps. For Envtl Responsibility v. Schroe*r, No. 3:18-CV-13-TAV-HBG, 2019 WL 11274596 (E.D. Tenn. June 21, 2019).
[142] 87 Fed.Reg. 35318, 35365 (June 9, 2022).
[143] CWA §401(a)(2), 33 U.S.C. §1341(a)(2).
[144] *Id.* Under the 2020 Certification Rule, a "neighboring jurisdiction" can be a state or a tribe with "Treatment in a Manner as a State" (TAS) under CWA §518(e). Amendments to the CWA enacted after section 401 provided that tribes could seek TAS. As a result, when 401(a)(2) uses the word "state" or "states," EPA has interpreted the words

neighboring jurisdiction, the Administrator shall notify the neighboring jurisdiction, the licensing or permitting agency, and the applicant.[145] "If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such hearing."[146] If a hearing is held, "the Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency."[147]

The 2020 Rule asserted that determining whether a discharge "may affect" neighboring jurisdictions is discretionary on the part of EPA,[148] but did not otherwise provide clarifying detail about the neighboring jurisdiction consultation process under section 401(a)(2). The Proposed Rule interprets EPA's "may affect" determination as mandatory, not discretionary. The proposal also provides substantially more detail about the neighboring consultation process, and examples of the factors EPA might take into account when making a "may affect" determination.[149] The proposal also explicitly states "a Federal license or permit may not be issued until the section 401(a)(2) process is complete."[150]

States and tribes have emphasized the importance of section 401(a)(2), particularly where addressing waters with discharges from multiple states. For example, in its 2019 comment letter, Maryland Department of the Environment emphasized the critical importance of 401(a)(2) given the state's extensive investment in meeting Chesapeake Bay's Total Maximum Daily Load (TMDL) requirements.[151]

10a. <u>The Role of Waiver in Section 401(a)(2) Should be the Same as a Certification</u>

After receipt of an application for a federal permit or license and its associated certification or waiver, EPA has thirty days to complete a "may affect" determination.[152] Two sources of significant uncertainty have been (1) whether a certification waiver may trigger the 401(a)(2) process, and (2) is EPA making a "may affect" determination at the Agency's discretion or is such a determination mandatory.

The Proposed Rule establishes that receipt of either a certification or waiver in combination with an application for a federal permit or license triggers the 401(a)(2) process. The proposal's preamble explains that a waived certification could result in water quality impacts that might violate a neighboring jurisdiction's water quality requirements, and thus it is reasonable to provide an opportunity for a neighboring jurisdiction to evaluate that possibility.[153]

Recommendation: NAWM believes EPA's rationale for including waivers as triggering the 401(a)(2) process is sound, and recommends the interpretation be reflected in the Final Rule.

10b. <u>EPA's "May Affect" Determination Should Be Mandatory, Not Discretionary</u>

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as including states as well as tribes with TAS status for section 401. EPA also refers to tribes with TAS for section 401 also referred to as "authorized tribes."

[145] 40 C.F.R. §121.12(c); 85 Fed.Reg. 42210, 422774 (July 13, 2020).

[146] CWA §401(a)(2), 33 U.S.C. §1341(a)(2).

[147] *Id*.

[148] 85 Fed.Reg. 42210, 42273-42274 (July 13, 2020).

[149] *See* 87 Fed.Reg. 35318, 35365-35370 (June 9, 2022).

[150] *Id.*at 35365.

[151] See Maryland Department of Environment Comment Letter re Updating Regulations on Water Quality Certifications (Submitted to Docket ID No. EPA-HQ-OW-2019-0405-0025 on October 21, 2019, Attachment 1, p. 1)

[152] *Id.*

[153] *Id.*at 35366.

The second source of uncertainty is whether EPA has a mandatory or discretionary duty to make a "may affect" determination. The 2020 Rule identified a "may affect" determination as being at EPA's discretion and provided no specific factors the Agency should consider when choosing to make such a determination.[154] In contrast, the proposed Certification Improvement Rule concludes that EPA has a mandatory duty to make a "may affect" determination.

NAWM is aware of only one court decision addressing whether or not EPA's action to determine if a discharge "may affect" other state or tribal waters is discretionary. In *Fond du Lac v. Thiede*, a Minnesota district court held that the action was mandatory and EPA lacked discretion to not make a determination about whether the discharge authorized by the proposed § 404 permit "may affect" the Band's waters.[155] The court noted the existence of such a clear and limited [30-day] timeframe supported the argument that the statute imposes a duty on EPA to make a "may affect" determination, and interpreted the statutory text of 401(a)(2) in its broader statutory context:

> "Given that the purpose of [CWA §401(a)(2)] appears to be to provide a mechanism to work out potential interstate conflicts over water pollution, it seems unlikely that, when a discharge permitted by State A may pollute the waters of State B, Congress intended to leave State B's participation rights entirely up to the unreviewable discretion of EPA. See 33 U.S.C. § 1251(b) ('It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources…')."[156]

The court's decision highlights a particular concern NAWM has heard often from our state and tribal members: a concern about the potential impact to their waters from upstream waters or wetlands, where upstream states or tribes lack independent authority to regulate discharges into those waters. If a state or tribe lacks independent authority to address such discharges, the sole recourse for reviewing federally authorized discharge activities is through CWA § 401 certification. If EPA's duty to determine whether discharges "may affect" the water quality in neighboring jurisdictions is wholly discretionary, section 401(a)(2) may not significantly reduce the likelihood that activities in upstream waters and wetlands will threaten water quality in downstream waters. EPA has indicated that 401(a)(2) has been rarely used, with regional offices following the statutory process of notification roughly ten times since 1972.

NAWM is not unmindful of the potential administrative burden a mandatory duty to make a "may affect" determination could place on EPA's regional offices. It may be helpful to note that EPA regional offices are not determining "will affect" but only whether there is a possibility a proposed project's discharges may have an effect … a determination requiring significantly less technical analysis.

The preamble to the Proposed Rule suggests some of the factors an EPA regional office might consider include: type of project and discharge covered in the permit or license, the proximity of the project and discharge to other jurisdictions, certification and other conditions already contained in the draft license or permit, and the neighboring jurisdiction's water quality requirements.[157] Such factors could allow EPA to make a quick "may affect" determination. Additional quick factors could include the size of the project

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[154] *See* 85 Fed.Reg. 42210, 42273 (July 13, 2020).

[155] *Fond du Lac Band of Lake Superior Chippewa v. Thiede,* (D.C. Mn, Case No. 19-CV-2489)(Decided February 16, 2021). Fond du Lac's letter dated August 3, 2021 describing their water quality concerns can be found at: 2021-08-03FDL401a2NotificationObjectionPolyMetMine.pdf (fdlrez.com)

[156] *Id.*

[157] 87 Fed.Reg. 35318, 35365-35367-8 (June 9, 2022).

and its potential impacts, and if there are documented concerns about the project from a neighboring jurisdiction.

Recommendations: NAWM strongly supports the Proposed Rule's interpretation that a "may affect" determination is mandatory, not discretionary, on the part of EPA and strongly encourages that interpretation should be reflected in final rule text. In addition, NAWM believes the preamble discussion of the types of factors EPA might consider when making a "may affect" determination increases clarity. NAWM agrees with EPA that it is unnecessary to make an exhaustive list of factors that must be analyzed, since the determination is likely to be fact-dependent and based on situation-specific circumstances.

10c. Additional Detail About the 401(a)(2) Process increases Certainty and Predictability

A number of states and tribes have indicated that the 401(a)(2) neighboring jurisdiction process is rather mysterious. EPA previously has provided little if any information about factors it will consider when making a "may affect" determination, what EPA considers to be a "neighboring jurisdiction" for purposes of 401(a)(2), what neighboring jurisdictions should include in a 401(a)(2) objection to a proposed permit, and other details. The 2020 Rule provided little detail that was not already in the CWA. Many states and tribes found the lack of detail in how 401(a)(2) processes would work to be unhelpful. For example, Wisconsin Department of Transportation (WSDOT) expressed concern over the "lack of scope and predictability of criteria under consideration." In its pre-proposal comment letter, WSDOT suggested that the rule "include defined criteria as a basis for the federal agency to determine if coordination with a neighboring jurisdiction or jurisdictions is appropriate. Some criteria for making this determination may include the type of project (e.g., new alignment v. modifying and maintaining existing infrastructure), thresholds or categories for impacts, size, and quantity of aquatic resources (e.g., project impacts to a large river may be more likely to affect neighboring jurisdictions than project impacts to a small stream or wetland), and project proximity to neighboring jurisdictions."[158] NAWM is pleased to note the Proposed Rule provides considerably greater detail on these and other issues, thereby increasing certainty and predictability.

Recommendation: NAWM appreciates the additional detail the Proposed Rule provides on the 401(a)(2) process and believes such clarifying detail should be included in the Final Rule preamble and rule text.

NAWM believes that inter-jurisdictional discussions are important for ensuring certification decisions and subsequent federal licenses or permits are consistent with the intent of section 401 and CWA goals. In addition to the neighboring jurisdiction consultation process established by CWA section 401(a)(2), it would be helpful to establish a process for evaluating discharges and their locations which are likely to affect other jurisdictions prior to a certification being issued. This could involve the Regional Administrator(s), federal agencies, and the certifying authorities to collaborate to develop a process, relevant information, and criteria, which under the process should include early notification of a certification request or certification public notice to an affected jurisdiction. While there would be an additional commitment of personnel to develop the process, we believe that this would be the most effective approach for addressing effects of discharges on downstream states earlier in the certification process instead upon conclusion of a process. The 401(a)(2) process as set up by the CWA and reflected

[158] Wisconsin DOT Comment Letter on Docket ID No. EPA–HQ–OW–2021–0302 submitted to EPA on July 15, 2022.

in the Proposed Rule can have the unintended consequence of potentially adding significant time to a project proponents timeline

Recommendation: EPA consider establishing a process by which Regional Administrators, federal licensing or permitting agencies, and the certifying authorities collaborate to develop a process for early information sharing and discussion of circumstances which may affect neighboring jurisdictions.

11. **Treatment in a Similar Manner as a State (TAS) Under Section 401**

CWA section 518 authorizes EPA to treat federally-recognized Indian tribes in a similar manner as a state (TAS) for purposes of administering most CWA programs over Federal Indian reservations, including section 401 water quality certification. However, in practice tribes have received TAS for section 401 as an ancillary authority when a tribe receives TAS for water quality standards. The Proposed Rule provides for the first time a specific process by which a tribe may receive TAS for either section 401 certification as a whole or for just 401(a)(2)'s neighboring jurisdiction consultation process.[159] The proposal also describes EPA's procedures for reviewing and processing an application for section 401 TAS.

Tribes have long expressed an interest in better understanding the TAS process generally, and the process for receiving TAS for section 401 specifically. TAS for section 401 has been a recurring topic for training requests to both EPA and NAWM. The details provided in the Proposed Rule will be helpful for tribes wishing to have section 401 certification authority to help protect their water resources. An opportunity to either receive TAS for all of section 401 or for the limited purpose of 401(a)(2) neighboring jurisdiction consultation seems reflective of the fact many tribes may wish to be notified about potential federal licenses and permits that may affect their waters, but a tribe may not be interested or lack resources to administer section 401 in its entirety. The proposal also seems responsive to tribal concerns that tribes without TAS for section 401 cannot participate in the 401(a)(2) process.

Based on conversations with NAWM's tribal members, a couple of issues could benefit from additional details in the Final Rule. For example, if a tribe has not received TAS for CWA section 303 water quality standards, what standards should the tribe consider when making a certification analysis? One possibility might be tribal water quality standards expressed in statute or regulation, even if not submitted to EPA under section 303. Another possibility reflects longstanding practice, which is considering the water quality standards of a neighboring jurisdiction for similar waters where the tribe has not developed standards for itself whether EPA-approved or not. A second issue is how will EPA communicate the status of an application for section 401 TAS? The Proposal Rule preamble indicates that the procedures for section 401 TAS are based on regulations for receiving TAS for section 303 water quality standards. However, the process of TAS for section 303 has long been criticized as a "black box" where it is difficult for tribes to know where in the approval process their TAS application lies, and whether issues or inadequacies are emerging. It would be helpful if the Final Rule spelled out how EPA will manage a timely and transparent process for receiving section 401 or 401(a)(2) TAS.

Recommendation: NAWM believes the proposed Certification Improvement Rule's provisions establishing a process for tribes to get TAS for 401 in its entirety or for only 401(a)(2) is responsive to concerns raised by tribes. As a result, NAWM recommends that the final rule incorporate the

[159] 87 Fed.Reg. 35318, 353700-35373 (June 9, 2022).

proposed TAS process, while providing additional clarity regarding the TAS process on issues such as those discussed above.

Closing Remarks

NAWM appreciates EPA's efforts to develop the Certification Improvement Rule and is very supportive of how the Proposed Rule reflects the principles of collaborative federalism inherent in section 401 and the CWA as a whole. NAWM strongly supports EPA's objective of developing a revised section 401 rule that is fully consistent with the goals of the CWA. The proposal does much to remedy inappropriate provisions in the 2020 Rule that were inconsistent with the statute and CWA goals.

Many states and tribes have criticized the 2020 Rule as placing restrictions on the scope of certification analyses that were inconsistent with the CWA, and for establishing procedural requirements for states and tribal certification authorities that were beyond EPA's authority under the CWA to oversee. NAWM believes the Proposed Rule responds to these concerns by being less prescriptive than the 2020 Rule, and by leaving several substantive and procedural decisions up to the certifying authority. Other decisions typically are reached by the federal agency and state/tribal certifying authority collaboratively. As a result, NAWM believes the Proposal Rule represents a substantial improvement over prior regulations and congratulates EPA in its development, even while offering comments on how the Final Rule could be further refined.

Thank you for the opportunity to submit policy recommendations, information, and other comments in support of EPA's efforts to develop revised regulations implementing CWA section 401 certification. Although these comments have been prepared by NAWM with input from the NAWM Board of Directors, they do not necessarily represent the individual views of all states and tribes. We encourage your full consideration of the comments of individual states and tribes, and other state and tribal associations.

Sincerely,

Marla Stelk
Executive Director

Cc:
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